



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CIVIL SUIT NO. 1435 OF 2014

DR KEGURO MUHINDI..... PLAINTIFF

VERSUS

SUSAN WAMUHU NG'ETHE..... DEFENDANT

J U D G M E N T

Background

1. The defendant is the widow of the late Ng'ethe Waiyaki (the deceased). In 1996, the deceased sold to the plaintiff Land Parcel Number Dagoretti/Kinoo/2163 through a sale agreement of even date. Both parties to the sale agreement retained **Susan Nduta Munyi Advocate (the advocate)** practicing as **Susan Munyi & Co. Advocates**, to act for them in the transaction. The plaintiff remitted the entire purchase price to the advocate and the land was duly transferred into the plaintiff's name and a title issued to the plaintiff. The advocate did not, however, remit the money to the vendor, leading to disciplinary proceedings against her and her eventual conviction and punishment by the Advocates Disciplinary Committee.

2. Arising from the misappropriation of client money by the said advocate, the deceased sued the plaintiff in **Nairobi HCCC No 3054 of 1997 (OS) Ng'ethe Waiyaki v Dr Keguro Muhindi**, seeking an order transferring the land back to him. In a Judgment delivered on 17/10/1998, the High Court dismissed the deceased's claim and held that: (i) there was a valid sale agreement; (ii) the land was properly transferred to the plaintiff; (iii) the prayer for transfer of the land to the deceased would not lie; and (iv) the party at fault was the advocate, Susan Nduta Munyi.

3. Subsequently, in 2001, the deceased sued the advocate in **Nairobi (Milimani Commercial Courts) HCCC No 968 of 2001; Nge'the Waiyaki v Susan Nduta Munyi**. On 2/7/2002, the deceased obtained Judgment against the Advocate for Kshs 700,000 plus interest at court rate and costs of the suit. A consequential decree was issued on 28/10/2002. It is not clear if the deceased recovered the decretal amount.

Plaintiff's Case

4. The deceased subsequently died in 2005, leaving the defendant on the suit property. The plaintiff contends that after the demise of Ng'ethe Waiyaki, the defendant made a plea to be allowed to remain on the suit property as she made arrangements to relocate from the suit property. He contends that he granted the request. The plaintiff further contends that the defendant has taken advantage of his generosity and has now refused to move out of the suit property. This is what triggered this suit in which the plaintiff seeks the following orders

- a) A declaration that the continued occupation of the parcel of land known as Title No DAGORETTI/KINOO/2163 by the defendant whether by herself, her family members, agents, employee or anyone acting under her authority is illegal, unlawfull and amount to the tort of trespass to private property.
- b) An order that the defendant gives vacant possession of the Parcel of land known as Title No. DAGORETTI/KINOO/2163 to the plaintiff
- c) An order of eviction of the defendant her family members, agents, servants, employees or anyone acing under her authority from the parcel of land known as DAGORETTI /KINOO/2163
- d) An order that the OCS Kabete Police Station do provide security during the eviction and ensure compliance with court orders.
- e) General damages for trespass and cost of the suit.

Defendant's Case

5. On 16/12/14 the defendant entered appearance and filed a statement of defence and counterclaim in which she contested the plaintiff's claim and raised a counterclaim. She contends that the plaintiff's suit is statute-barred under the Limitation of Actions Act. She also contends that she has had uninterrupted occupation and exclusive possession of the suit property from December 1996 when the sale agreement was executed and she continued to have possession after the death of her husband on 25/11/05. She contends that she has acquired title to the suit property under the doctrine of adverse possession. She prays for the following orders:-

- (a) A declaration that the defendant has acquired title to the parcel of land known as Land Reference Number Dagoretti/Kinoo/2163 measuring approximately 0.161 Ha registered in the name of the plaintiff by way of adverse possession.
- (b) An order directing the Chief Land Registrar and/or any Land Registrar to register the Defendant as the owner of all that property known as Land Reference Number Dagoretti/Kinoo/2163 measuring approximately 0.161 Ha in place of the plaintiff whose name the said parcel of land is registered.
- (c) Cost of this suit
- (d) Interest on (c) above
- (e) Any other relief the court may find suitable and fit to grant

Evidence

6. At trial, PW1 - Dr Keguro Muhindi, adopted his written statements dated 7/11/2014 and 13/11/14 as his sworn evidence in chief. He produced the following 8 Documents as Exhibits: (i) copy of Title for Parcel No Dagoretti/Kinoo/2163; (ii) copy of official search in respect to the shit property; (iii) copy of the judgment in HCCC No 3054 of 1997 (OS) Ngethe Waiyaki v Keguro Muhindi; (iv) bundle of the plaintiff's demand to vacate the suit property addressed to the defendant; (v) copy of summons to report to the area chief's office dated 30/4/2014; (vi) a copy of the assistance chief's order to trim fence dated 26th March 2014; (vii) a copy of demand letter dated 11th November 2014; and (viii) copy of letter dated 21/10/2003 from the defendant's advocate. He stated that Susan Nduta Munyi acted for both parties in the sale contract and she was convicted by the Advocates Disciplinary Committee for failing to remit the purchase price money to the client. He also testified that the deceased filed a suit against him, which suit was dismissed by court. He further testified that both parties to the sale agreement complained to the Advocates Disciplinary Committee and that it is not true that he did not pay the full purchase price. He

urged the court to grant the orders sought and dismiss the defendant's counterclaim.

7. In cross examination, PW1 testified that he entered into the sale agreement with the deceased on 11/11/1996 and the defendant was not a party to that agreement. He stated that he does not have a copy of the sale agreement because it was produced in court in the preceding case. He stated that he sued the defendant because she is illegally occupying the suit property. He further testified that he does not know if the defendant is the administrator of the estate of the late Ng'ethe Waiyaki and that he has been urging the defendant to move out of the suit property for long. He also testified that he at one point requested the advocate to reverse the transfer if she was not willing to release the purchase price to deceased. Lastly, he testified that at the time of purchasing the suit property, the deceased and his family were in possession of the suit property.

8. In re-examination, PW1 stated that in a letter dated 2/5/2000 to the Law Society of Kenya, the deceased confirmed that the plaintiff had paid the purchase price to the advocate. He further testified that the deceased filed the case against him because he had not received full purchase price money from the advocate who acted for both parties. He also testified that he was a neighbour to the deceased and he allowed him to stay on the suit property because he had requested for a grace period to vacate the property.

9. DW1 - Susan Wamuhu, adopted her written statement dated 16/3/14 as her sworn evidence in chief. She stated that the suit property belongs to her late husband and that her late husband sold the suit property to the plaintiff but the plaintiff did not pay the purchase price. She further stated that she has lived on the suit property for 17 years and the defendant has never asked her to vacate the suit property. She also testified that the suit property is registered in the name of the plaintiff. DW1 produced the following 8 Exhibits: (i) copy of letter dated 2nd May 2000 to the LSK by Mr Ng'ethe Waiyaki; (ii) copy of letter by LSK dated 5th May 2000 addressed to Susan Munyi; (iii) copy of letter dated 31st January 2001 by the Complaint Commission addressed to Ms Munyi; (iv) a copy of a ruling by the LSK Disciplinary Committee dated 1997; (v) copy of a letter dated 3rd June 1997 by the plaintiff to his lawyer; (vi) copy of a letter dated 4th June 1997 by the plaintiff to his lawyer; (vii) copies of Minutes of Meeting held by official receiver and creditors dated 13th October 2004; (viii) copy of a decree of the High Court dated 28th October 2002.

10. In cross examination, she stated that her husband died in 2005 and he was buried at Langata Cemetery. She further testified that she found out that her husband had sold the suit property when he started complaining that he had sold land to the plaintiff and he had not been paid. She stated that the plaintiff is a neighbor and she has been at his home twice as she is a friend to the plaintiff's wife. She testified that she lost two sons in 2008 and buried them at Langata Cemetery.

11. In re-examination, she testified that her husband and her two children were buried at Langata Cemetery because it was her late husband's wish. She further stated that she has always had grievances against the plaintiff because he holds the title to the suit property.

Submissions

12. The plaintiff filed written submissions dated 11/10/2017. He submitted that under **Sections 24, 25 and 26** of the **Land Registration Act**, the plaintiff, as the registered proprietor of the suit property, is vested with absolute and indefeasible ownership of the suit property, together with all the rights and privileges appurtenant to the title. The plaintiff further submitted that he paid full purchase price. He added that the deceased's attempt to cause a re-transfer of the suit property on the allegation that he had not paid purchase price was rejected by the High court in a Judgment delivered on 17/10/1998. The plaintiff further submitted that the issue of purchase price had been adjudicated upon and determined through the Judgments delivered in Nairobi **HCCC No. 3054 of 1997, and Nairobi HC (Milimani commercial Courts) Case No 968 of 2001.**

13. The plaintiff also submitted that he had explained the root of his title to the suit property and that the defendant had not established any of the grounds that would impeach his title under **Section 26** of the

Land Registration Act.

14. On the defendant's claim to the suit property under the doctrine of adverse possession, the plaintiff submitted that the defendant did not adversely dispossess the plaintiff the suit property in December 1996. The plaintiff contended that the plaintiff permitted the defendant and her family to remain on the suit property. He added that three of the defendant's family members could not be buried on the suit property because the plaintiff's ownership of the suit property was recognized and respected by the defendant's family.

15. The defendant filed written submissions dated 9/11/2017. She submitted that the plaintiff is not entitled to the orders sought because he was in breach of the agreement for sale pursuant to which he was registered as proprietor of the suit property. She added that the plaintiff's title is held subject to unregistered rights under **Section 29(1) of the Land Registration Act** because the plaintiff did not pay consideration for the title he holds. The defendant further submitted that the plaintiff's interest in the suit property was acquired through an unlawful transfer.

16. The defendant further submitted that under the general laws of contract, the plaintiff is entitled to rescind the agreement for sale on the ground of non-payment of the consideration.

17. On the plea of adverse possession, the defendant submitted that the defendant has had exclusive possession of the suit property since 1987 and that her title to the suit property has crystalized under the **Limitation of Actions Act**.

Issues

18. There are four key issues which emerge for determination in this suit: (i) whether the plaintiff's suit against the defendant is statute-barred under the Limitation of Actions Act; (ii) whether the plaintiff has acquired title to the suit property under the doctrine of adverse possession; (iii) whether the plaintiff is entitled to the relief sought in the plaint; and (iv) whether the defendant is entitled to the relief sought in the counterclaim.

Determination

19. The key defence raised in the statement of defence dated 16/12/14 is that the plaintiff's suit is statute-barred under **Sections 4, 7 and 29** of the Limitation of Actions Act. In her written statement of defence, the defendant invoked **Section 7** of the Limitation of Actions Act and contended that the plaintiff's suit is statute-barred. The above framework provides as follows:-

An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.

20. Through this suit, the plaintiff seeks to recover the suit property from the defendant. The material contract was executed on 11/11/1996. The official search presented as evidence reveals that the suit property was transferred into the name of the plaintiff on 3/2/1997. The plaintiff contends that he allowed the deceased vendor to continue occupying the suit property notwithstanding the fact that the plaintiff had remitted full purchase price to the parties' common advocate. Subsequently, while still living on the suit property, the vendor died on 25/11/2005. The plaintiff instituted the present suit on 13/11/2014.

21. Prior to 1997, the suit property belonged to Ng'ethe Waiyaki (the deceased husband to the defendant). The defendant lived on the suit property by virtue of being Ng'ethe Waiyaki's wife. It is not disputed that indeed Ng'ethe Waiyaki sold the suit property to the plaintiff. The plaintiff's evidence is that following the advocate's misappropriation of Ng'ethe Waiyaki's money, the plaintiff allowed Ng'ethe Waiyaki to continue occupying the suit property which hitherto belonged to him. This evidence has not been controverted in any way.

22. From the evidence presented in this matter, the defendant assumed possession of the suit property upon the death of her husband on 25/11/2005. In my view, the limitation period contemplated under Section 7 of the Limitation of Actions Act is to be reckoned from 25/11/2005, the day when Ng'ethe Waiyaki died and ceased to have possession of the suit property. This is the day the defendant assumed possession of the suit property. Consequently, the twelve year period contemplated under Section 7 of the Limitation of Actions Act lapsed in November 2017. The present suit was initiated on 13/11/2014. Without saying much, on simple arithmetic, I am not convinced that the plaintiff's claim is statute-barred. This is because, the twelve year period had not lapsed by the time the plaintiff instituted this suit. The answer to the first question therefore is that the plaintiff's suit is not statute-barred under the Limitation of Actions Act.

23. I now turn to the question as to whether the defendant has acquired title to the suit property under the doctrine of adverse possession. The common law doctrine of adverse possession connotes possession which is inconsistent with and in denial of the title of the true owner of land. To establish adverse possession, a litigant must prove that he has both the factual possession of the land and the requisite intention to possess the land [*animus possidendi*]. Secondly, one must prove that he has used the suit land without force, without secrecy, and without persuasion [*nec vi, nec clam, nec precario*] for the prescribed limitation period of twelve years. Third, he must demonstrate that the registered owner had knowledge [or the actual or constructive means of knowing] that the adverse possessor was in possession of the suit property. Fourth, the possession must be continuous; it must not be broken or interrupted. In **TITUS KIGARO MUNYI v PETER MBURU KIMANI, CA NO 28 OF 2014**, the Court of Appeal held that computation of time starts from when there is actual or constructive knowledge by the registered proprietor.

24. The doctrine of adverse possession has its statutory underpinning in **Sections 7, 9, 13, 37 and 38 of the Limitation of Actions Act**. The Court of Appeal examined the constitutionality of the doctrine of adverse possession in the context of the Constitution of Kenya 2010 in **MTAMA LEWA v KAHINDI NGALA MWAGANDI, [2015] eKLR** and found that the doctrine does not offend the spirit and letter of the present constitutional framework on protection of the right to property.

25. Under the Limitation of actions Act, title under the doctrine of adverse possession crystallizes upon expiry of 12 years from the date when the adverse possessor assumes exclusive possession of the suit property. In the present suit, the plaintiff assumed exclusive possession on 25/11/2005 when her husband who hitherto had possession of the suit property died. Based on the same computation outlined in the preceding paragraph, my finding on this issue is that the twelve year period necessary for crystallization of the adverse possessor's title had not lapsed by the time the defendant brought the counterclaim. For this reason, my finding on the second question is similarly in the negative.

26. Having found that the defendant's claim for title under the doctrine of adverse possession had not lapsed by the time the plaintiff brought the present suit, it follows that the orders sought by the defendant through the counterclaim are unavailable in their entirety.

27. I now turn to the last issue, which is the question as to whether the plaintiff is entitled to the orders sought in the plaint. The plaintiff is the registered proprietor of the suit property. In the past, the deceased husband to the defendant brought an originating summons seeking an order retransferring the suit property back to him. The High Court made a finding that the land was sold and properly registered in the name of the plaintiff. Subsequently, the deceased sued his advocate who had misappropriated the sale money. He obtained judgment. It is not clear if he recovered the money from the advocate.

28. Section 26 of the Land Registration Act specifies the grounds upon which a registered proprietor's title may be impeached. It provides thus:

Section 26 (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as *prima facie* evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions

contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party;

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

29. Suffice to say that, a party challenging the title of a registered proprietor has a statutory duty to prove that the subject title was obtained fraudulently or through mis-representation to which the title-holder was a party; or that the title was acquired illegally, unprocedurally or through a corrupt scheme. In the absence of proof of one of the above grounds on a balance of probabilities, unsubstantiated challenge against a registered title cannot stand. In the present suit, the plaintiff has given an account of how he acquired the title that he holds. That process is devoid of any of the grounds specified in the above framework. On her part, the defendant has not presented any evidence to establish any of the grounds spelt out in Section 26 of the Land Registration Act. Consequently, there is no basis why this court should not affirm the sanctity of the title held by the plaintiff. My finding on this issue therefore is that the plaintiff is properly entitled to the relief sought in the plaint.

30. Before I give the court's disposal orders, I would say that the facts of this case should prick the conscience of the legal fraternity in Kenya. That an advocate received purchase price on behalf of a client and dealt with the money in the manner disclosed in this suit is most abhorable. Today, the family of the late Ng'ethe Waiyaki finds itself where it is solely because of the culpable advocate.

Disposal Orders

31. The upshot of the above findings is that this court is satisfied that the plaintiff has proved its claim on a balance of probabilities. Consequently, prayers (a), (b), (c), and (d) of the plaint are granted. The defendant shall have a period of 120 days within which to voluntarily vacate the suit property. The defendant's counterclaim is dismissed.

32. Because of the unique circumstances of this case, which indicate that parties to this suit find themselves where they are because of the conduct of the advocate who acted for the plaintiff and for the deceased husband of the defendant, I would not award general damages. For the same reason, I order that each party shall bear own costs of this suit.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 7TH DAY OF MARCH 2018.

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B M EBOSO

JUDGE

In the presence of:-

Mr Thuku advocate for the Plaintiff

Mr Rono advocate for the Defendant

Halima - Court clerk